

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER

Case No.: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

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THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**DECISION ON MOTION BY THE BADREDDINE DEFENCE FOR THE
DISCLOSURE OF INVESTIGATORS' NOTES**

Office of the Prosecutor:

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& Mr Alexander Milne

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Mr Mohamed Aouini, Ms Dorothee Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:

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Hassan & Ms Natalie von Wistinghausen

Counsel for Mr Assad Hassan Sabra:

Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. Witnesses PRH705 and PRH707 provide evidence for the Prosecution about the Lebanese telecommunications operators. Prosecution investigators have interviewed and obtained statements from both witnesses. The Defence of the Accused Mr Mustafa Amine Badreddine asks the Trial Chamber to order the Prosecution to disclose any notes taken during the witness interviews and the list of the questions asked of the witnesses. Defence counsel seek this disclosure as material necessary for Defence preparations under Rules 110 (A), (B)¹ and 130 (A)² of the Special Tribunal's Rules of Procedure and Evidence.³ Counsel also ask the Trial Chamber to order the Prosecution to change its general practice in interviewing and obtaining statements from witnesses. This decision only deals with the first issue.

2. The Prosecution responded⁴, counsel for Mr Badreddine replied,⁵ and the Prosecution, at the Trial Chamber's request,⁶ filed further submissions.⁷ In their reply, counsel also ask the Trial

¹ Rule 110 states : "Subject to the provisions of Rules 115, 116, 117 and 118 : (A) the Prosecutor shall make available to the Defence in a language which the accused understands, (i) within thirty days of the initial appearance of an accused, or within any other time-limit prescribed by the Pre-Trial Judge, or in the case of joinder under Rule 70 (C) the Trial Chamber, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecutor from the accused; and (ii) within the time-limit prescribed by the Trial Chamber or by the Pre-Trial Judge, copies of: (a) the statements of all witnesses whom the Prosecutor intends to call to testify at trial; (b) all statements, depositions, or transcripts taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158; and (c) copies of the statements of additional prosecution witnesses. (B) The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

² Rule 130 (A) states : The Trial Chamber, after hearing the parties, may give necessary directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial. These may include *inter alia* orders relating to disclosure and directions to the Parties regarding communication between Parties and witnesses.

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2445, Requête urgente de la Défense de Mustafa Amine Badreddine relative aux modalités du recueil et de la présentation des déclarations de témoins et aux fins de communication de matériel nécessaire à la préparation de la Défense, 9 February 2016.

⁴ F2455, Prosecution Response to "Requête urgente de la Défense de Mustafa Amine Badreddine relative aux modalités du recueil et de la présentation des déclarations de témoins et aux fins de communication de matériel nécessaire à la préparation de la Défense", 15 February 2016; Transcript of 12 February 2016, pp. 1-2.

⁵ F2465, Réplique de la Défense de M. Mustafa Amine Badreddine à la «Prosecution Response to "Requête urgente de la Défense de Mustafa Amine Badreddine relative aux modalités du recueil et de la présentation des déclarations de témoins et aux fins de communication de matériel nécessaire à la préparation de la Défense"», 22 February 2016.

⁶ Email from Trial Chamber Legal Officer to the Parties, 22 February 2016.

⁷ F2469, Prosecution Submissions Filed Pursuant to the Trial Chamber's Order of 22 February 2016, 25 February 2016. The submissions addressed the arguments made by the Badreddine Defence at paragraphs 20-23 of the motion, in light of the Appeals Chamber's decision of 19 July 2011 in *El Sayed*.

Chamber to order the disclosure of correspondence and notes taken during telephone or Skype conversations between the Prosecution, the witnesses and others. In the alternative, they request an order that the Prosecution disclose this material, on an *ex parte* basis to the Trial Chamber, so that the Trial Chamber can assess whether any of it should be disclosed to the Defence.⁸

SUBMISSIONS

3. Counsel for Mr Badreddine request the Prosecution to disclose all notes taken by Prosecution investigators when they interviewed Witnesses 705 and 707, and the complete list of questions put to them during those meetings.⁹ The Defence requires this material to properly prepare to cross-examine the witnesses, and argues that the statements do not reveal any hesitation or uncertainty they might have shown in answering some questions, or whether the Prosecution was suggesting any of the answers.¹⁰

4. To support their position that this material is not internal work product as defined in Rule 111,¹¹ and must be disclosed, counsel rely, notably, on a decision of the Appeals Chamber in *El Sayed* holding that any exceptions to the general rule on disclosure depend on the assessment not just of a document's title, but also of its actual content, function, purpose and source.¹²

5. Counsel requested this material several times from the Prosecution, mostly unsuccessfully.¹³ The Prosecution disclosed only the requests for assistance that it sent to the Lebanese government, which included documents outlining the topics of possible evidence from the two Lebanese telecommunications companies.¹⁴ These are, in the Defence's view insufficient, because they only

⁸ Badreddine reply, paras 4 and 9.

⁹ Defence motion, para. 1.

¹⁰ Defence motion, paras 14.

¹¹ Rule 111 provides that reports, memoranda, or other internal documents prepared by a Party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure or notification under the Rules.

¹² CH/AC/2011/01, *In the matter of El Sayed*, F0005, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011, 19 July 2011, paras 73 and 106.

¹³ The written correspondence between the Parties is annexed to the motion.

¹⁴ Defence motion, paras 3, 6-7.

indicate the information that the Prosecution sought and cannot be read in parallel to the statements, as the topics listed are not identical to those in the statements.¹⁵

6. The Prosecution responded that the Defence seeks disclosure of materials that do not exist and therefore are not subject to disclosure. The requests for assistance and their attachments are the only structured list of questions available, and have already been disclosed to the Defence.¹⁶ The witness statements reflect a process of information gathering, undertaken through requests for assistance, meetings, emails, telephone and Skype conversations, rather than a simple question and answer session.¹⁷ As a result, the Prosecution did not put any notes to the witnesses that are subject to disclosure.¹⁸ Moreover, notes containing comments and the thoughts of Prosecution investigators that have not been put to or shared with the witnesses are internal work product not subject to disclosure under Rule 111.¹⁹ Finally, these witnesses are distinguishable from typical fact witnesses, because their evidence reflects the knowledge of the corporations they were appointed to represent, rather than their own.²⁰

7. This distinction between Witnesses 705 and 707 and typical fact witnesses is contested by the Badreddine Defence. Counsel for Mr Badreddine argue that they must cross-examine the witnesses and not the companies they represent, hence witness statements must allow for adequate preparation and an effective defence.²¹ Moreover, the Prosecution has not stated whether investigator notes in its possession contain answers given by the witnesses.²²

8. In supplementary submissions on the Defence arguments regarding *El Sayed*, the Prosecution disagrees with the Defence that investigators' notes taken during a witness interview are subject to

¹⁵ Defence motion, para. 15.

¹⁶ Prosecution response, para. 2.

¹⁷ Prosecution response, paras 6 and 8.

¹⁸ Prosecution response, para. 10.

¹⁹ Prosecution response, para. 12.

²⁰ Prosecution response, para. 8.

²¹ Badreddine reply, para. 2.

²² Badreddine reply, paras 5- 6.

disclosure, and argues instead that they may be subject to disclosure if the sole or primary source of a witness's evidence, or if a formal statement signed by the witness does not exist.²³

Further Defence motion for relief (in reply)

9. In their reply, counsel for Mr Badreddine also ask the Trial Chamber to order the disclosure of emails between the Prosecution and the witnesses or other employees of the Lebanese telecommunications providers, and the notes taken during telephone or Skype conversations. In the alternative, they request an order that the Prosecution disclose this material and any investigator notes, on an *ex parte* basis to the Trial Chamber, so that the Trial Chamber can assess whether any of it should be disclosed to the Defence.²⁴ The Prosecution did not respond to their request for further orders.

DISCUSSION

10. The Trial Chamber has carefully reviewed the submissions of the Parties in light of Rule 110, which governs the Prosecutor's disclosure obligations, and Rule 111, which exempts internal documents and work product from disclosure.

A. List of questions put to the witnesses

11. The Trial Chamber agrees that the questions put to witnesses—if they exist—may be disclosable.²⁵ However, if these do not exist, there is nothing to disclose. The Prosecution has submitted that it possesses no list of questions put to witnesses that would be subject to disclosure.²⁶ The Trial Chamber accepts that the Parties make representations in good faith and in accordance with the conduct expected of counsel, and therefore there are no questions put to witnesses which are subject to disclosure.

²³ Prosecution supplementary submissions, paras 3-5.

²⁴ Badreddine reply, paras 4 and 9.

²⁵ See, e.g., ICTR, ICTR-96-14-A, *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 31, 'A record of interview, ideally, is composed of all the questions that were put to a witness and all of the answers given by the witness'.

²⁶ Prosecution supplementary submissions, para. 6.

B. Disclosure of investigators' notes

12. The Defence request for disclosure of investigators' notes relies on an incorrect interpretation of the Appeals Chamber's Decision on Partial Appeal by Mr El Sayed. There, the Appeals Chamber examined the classification of documents under Rule 111, concluding that it understood 'investigators' notes' to refer 'to those documents that contain *the thoughts and original work* of investigators, often in unpublished or incomplete form. They therefore likewise fall within Rule 111'.²⁷ But, 'statements from witnesses recorded in direct or indirect speech, including identification of relevant persons, contained within documents labelled "internal memoranda" and "investigators notes", are not covered by Rule 111'.²⁸ They are therefore disclosable.

13. Here, however, the Prosecution has specified, first, that no list of questions exists, and, second, that any investigators' notes were not put to the witnesses during the interview.²⁹ Therefore, any notes possessed by the Prosecution contain only the 'thoughts and original work of investigators'. As the Appeals Chamber held, 'investigators notes fall within the protection of Rule 111 where they contain the *'thoughts and original work* of investigators, often in an unpolished or incomplete form'.³⁰ Such materials—if any exist—are thus exempt from disclosure under Rule 111.

14. Further, international criminal law case-law (although not referred to by the Appeals Chamber in its decision) provides that 'any note made by counsel or another staff member of the

²⁷ *El Sayed*, para. 96.

²⁸ *El Sayed*, para. 109. At para. 83, the Appeals Chamber disagrees with a Trial Chamber of the International Criminal Court in ICC, *Lubanga Dyilo*, Redacted Decision on the Prosecution's Disclosure Obligations Arising out of an Issue concerning Witness DRC-OTP-WWW-0031, ICC-01/04-01/06, 20 January 2011, paras 17-18. The Appeals Chamber concluded at para. 88, that it did not agree with that decision as it related to "'all preliminary examination reports', 'investigators' interview notes that are reflected in the witness statements or audio-video recording of the statement', and 'investigator's subjective opinions or conclusions that are recorded in the investigators' notes' may be exempted from disclosure.' This, however, overlooks that the ICC's Office of the Prosecutor's preliminary examination reports are public documents that are published on its web-site, and that the *Lubanga* decision, at para.18, specified 'this is subject to the caveat... that if information in this category contains disclosable information, it will be provided to the defence...' There is therefore no contradiction between *El Sayed* and *Lubanga*.

²⁹ ICTR, ICTR-96-14-A, *Niyitegeka v. Prosecutor*, Appeals Chamber Judgement, 9 July 2004, para 34.

³⁰ Decision on Partial Appeal by Mr El Sayed, para. 96.

Prosecution in relation to the questioning of the witness is not subject to disclosure, unless it has been put to the witness’.³¹

15. The Appeals Chamber’s decision requires disclosure of investigators’ notes only where they reflect statements from witnesses recorded in direct or indirect speech.³² Consequently, it appears that there is no risk that any information held by the Prosecution (if it exists) contains information from interviewees that is subject to disclosure under Rule 110.³³

16. Moreover, in the Trial Chamber’s view, the decision, so far as it removes investigators’ notes from the protection under Rule 111, is limited to paragraph 109, which holds that ‘the words of a witness are not the Party’s work product; *they are the product of the witness*.’³⁴ But, the decision then reaffirms the protection of investigators notes, holding ‘Of course, this does not apply, for instance, to any additional comment by the investigators contained in the same document — in such a case, redaction might be appropriate.’³⁵

C. Disclosure of correspondence and Skype/telephone notes

17. The Prosecution did not respond with any specificity to the further motion by the Defence seeking disclosure of the correspondence between the witnesses and Prosecution, and notes taken during Skype or telephone calls with them—or alternatively, that the Trial Chamber examine the material for itself. It has not specified the content of the emails and correspondence between the Office of the Prosecutor and the two witnesses during the preparation for their statements. The Trial Chamber is thus unable to determine whether they contain anything disclosable under Rule 110 (B). The Trial Chamber will therefore have to examine this material for itself.

18. The Prosecution is therefore ordered to immediately provide to the Trial Chamber, on an *ex parte* basis, any relevant emails and correspondence between the Prosecution and the witnesses and employees of the Lebanese telecommunications companies. In relation to the disclosure of

³¹ ICTR, ICTR-96-14-A, *Niyitegeka v. Prosecutor*, Appeals Chamber Judgement, 9 July 2004, para 34.

³² Decision on Partial Appeal by Mr El Sayed, para. 109.

³³ Decision on Partial Appeal by Mr El Sayed, para. 83.

³⁴ Decision on Partial Appeal by Mr El Sayed, para. 109.

³⁵ Decision on Partial Appeal by Mr El Sayed, para. 109.

investigators' notes, the Prosecution, for the reasons above, has already informed the Trial Chamber that it has nothing disclosable. This part of the further motion is therefore dismissed.

CONFIDENTIALITY

19. Counsel for Mr Badreddine's motion annexes internal correspondence between counsel and the Prosecution, and two analytical tables of the two witnesses' statements. Counsel make no submissions on the classification of those annexes. Reiterating the public nature of these proceedings, the Trial Chamber orders counsel to file public redacted versions of the annexes or have them reclassified as public.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the motion by counsel for Mr Mustafa Amine Badreddine as it relates to disclosing questions asked of Witnesses 705 and 707, and disclosing any investigators' notes taken during interviews with Witnesses 705 and 707;

ORDERS the Prosecution to immediately provide the Trial Chamber, on an *ex parte* basis, with any relevant emails and correspondence with Witnesses 705 and 707 and employees of the Lebanese telecommunications providers concerned;

ORDERS counsel for Mr Badreddine to file public redacted versions of the annexes to its motion, or to have them reclassified as public.

Done in Arabic, English, and French, the English version being authoritative.

Leidschendam, the Netherlands

13 April 2016

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

